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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1233

NATIONAL LABOR RELATIONS BOARD AND PETER G. NASH, GENERAL COUNSEL, PETITIONERS

v.

SEARS, ROEBUCK AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The court of appeals rendered no opinion; its judgment (Pet. App. A, pp. 1a–2a) [1] is reported at 480 F. 2d 1195. The memorandum and order of the district court (Pet. App. C, pp. 4a–10a) are reported at 346 F. Supp. 751.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1973 (Pet. App. A, p. 1a). A timely peti-

[1] "Pet. App." refers to the appendix to the petition, "Op. App." to the appendix to respondent's brief in opposition to the petition, and "A." to the separate appendix printed pursuant to Rule 36.

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tion for rehearing *en banc* was denied on September 13, 1973 (Pet. App. B, p. 3A). On December 6, 1973, the Chief Justice extended the time to file a petition for a writ of certiorari to February 11, 1974. The petition was filed on that date and was granted on May 28, 1974 (A. 214). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The provisions of the Freedom of Information Act, 5 U.S.C. 552, are set out in the appendix to this brief, *infra*, pp. 53–56.

QUESTION PRESENTED

Whether the Freedom of Information Act requires the disclosure of internal agency memoranda authorizing or refusing to authorize the prosecution of cases before the adjudicatory branch of the agency, and discussing the evidence and the legal theories upon which the prosecution should be based.

STATEMENT

A. THE PROCEDURE FOR PROCESSING UNFAIR LABOR PRACTICE CHARGES

In the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*), Congress separated the National Labor Relations Board into two main functional divisions—an adjudicating side and a prosecuting side. The adjudicating side, the National Labor Relations Board, is assigned, *inter alia*, the task of adjudicating unfair labor practice cases, subject to review by the federal courts of appeals, 29 U.S.C. 153, 160. The prosecuting side is the General

Counsel and his staff. This case involves the discoverability, under the Freedom of Information Act, of memoranda generated by the General Counsel.

Under the Labor Act, the General Counsel has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [of the Act], and in respect of the prosecution of such compliants before the Board * * *." Section 3(d), 29 U.S.C. 153(d). The General Counsel's function with respect to unfair labor practice charges is like that of an attorney general or a United States Attorney[2] (see 93 Cong. Rec. 6859, remarks of Senator Taft). The General Counsel has delegated the power to decide, initially, whether a complaint should issue on a given unfair labor practice charge to the Board's 33 Regional Directors. National Labor Relations Board, Organization and Functions, Section 203.1, 32 Fed. Reg. 9589; National Labor Relations Board, Statements of Procedure (hereafter "Statements of Procedure"), Section 101.4, 29 C.F.R. 101.4.

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[2] In making the decision whether to issue a complaint, the General Counsel acts independently of the Board. 29 U.S.C. 153(d). In the prosecution of complaints before the Board, rather than as legal representative or advisor, National Labor Relations Board, Statements of Procedure, Section 101.12(a), 29 C.F.R. 101.12(a), the Board has its own staff of legal assistants, who are not part of the General Counsel's staff, to aid it in its decision-making. National Labor Relations Board, Organization and Functions, Section 201, 32 Fed. Reg. 9588. After the Board has acted, the General Counsel represents the Board in the federal courts of appeals in respect to petitions to enforce or set aside its orders. *Id.*, Section 202, 32 Fed. Reg. 9588-9589.

Section 3(d) of the Act, 29 U.S.C. 153(d), provides that the General Counsel shall exercise general supervision over the officers and employees in the regional offices.

Upon the filing of a charge, an investigation is conducted by a member of the regional office staff. During that investigation, statements may be secured from representatives of the parties and other potential witnesses, and documentary evidence may be assembled. Statements of Procedure, Section 101.4, 29 C.F.R. 101.4. If, on the basis of the evidence gathered, the charge appears to have merit, and if settlement efforts are unsuccessful, the Regional Director issues a complaint setting forth the acts alleged to constitute unfair labor practices. Statements of Procedure, Section 101.8, 29 C.F.R. 101.8; National Labor Relations Board, Rules and Regulations (hereafter "Rules and Regulations"), Section 102.15, 29 C.F.R. 102.15. If the Regional Director concludes that the charge is without merit, he declines to issue a complaint and so informs the parties by a letter setting forth a brief statement of the reasons for his action and advising the charging party of his right to appeal to the General Counsel. Statements of Procedure, Section 101.6, 29 C.F.R. 101.6; Rules and Regulations, Section 102.19, 29 C.F.R. 102.19.

In certain cases, however, before disposing of a charge, the Regional Director refers some or all of the issues presented to the General Counsel's Division of Advice in Washington, D.C. Statements of Procedure, Section 101.8, 29 C.F.R. 101.8. A case is submitted for advice if the Regional Director believes that it presents novel or complex problems, or if it involves issues which the General Counsel has specified should be submitted in the interest of insuring the development of a uniform prosecutorial policy. The request for advice is transmitted by a memorandum, which

details the facts developed and the issues on which advice is sought. In many cases, the contents of the regional office investigatory file on the case are transmitted along with the request for advice. "Operations of Office of National Labor Relations Board General Counsel," Op. App., pp. A3–A4 (hereafter "Operations").[4]

Upon receipt of a request for advice, attorneys in the Division of Advice consider the issues presented in the light of the evidence gathered in the investigation, and prepare a memorandum (the "advice memorandum") which is reviewed by the head of the Division of Advice or one of his assistants and is sent to the Regional Director (see *e.g.* A. 83–88, 185–189, 192–198). The memorandum is signed by the Associate General Counsel in charge of the Division of Advice. It may advise the Regional Director to dismiss the charge, to issue a complaint thereon, to proceed at his discretion, to seek a settlement, or to conduct a further investigation. The memorandum sets forth the reasons for the recommended action and, if it recommends issuance of a complaint, it may discuss possible factual and legal defenses, trial tactics, and a basis for settlement. Prior advice memoranda are occasionally referred to in an advice memorandum and sometimes even attached to it, but they serve only to amplify certain points in the discussion of the case

[4] "Operations" is a series of statements which was submitted by the General Counsel on June 29, 1961, to a House Labor Subcommittee on the National Labor Relations Board.

under submission. They are not used or cited as precedents, for the controlling law is the decisions of the Board and the courts (see A. 175)[5] (See generally Quarterly Report on Case-Handling Developments, *Labor Relations Yearbook* (BNA, 1968) 283–284; Operations, *supra*, Op. App., pp. A8–A9.)

When received by the Regional Office the advice memorandum becomes part of the office's investigative file (A. 19). Following receipt of the memorandum, the Regional Director disposes of the charge. While the Regional Director rarely, if ever, disregards advice on legal issues, he makes the ultimate decision whether to issue a complaint and in what form. The advice memorandum is not referred to either in the complaint or in any other communication, such as the dismissal letter (*supra*, p. 4), which the Director may send to the parties (A. 29–30), and is not made public.

If the Regional Director decides not to issue an unfair labor practice complaint, his decision may be appealed to the General Counsel, regardless of whether a case has previously been submitted to the Division of Advice. Statements of Procedure, Section 101.6, 29 C.F.R. 101.6; Rules and Regulations, Section 102.19(a), 29 C.F.R. 102.19(a). When such an appeal is taken, "the entire file in the case" is sent to the General Counsel's Office of Appeals, where it is reviewed by staff attorneys. Statements of Procedure, Section 101.6, 29 C.F.R. 101.6. The party taking the appeal files a statement setting forth the facts and reasons

[5] A skeletal subject matter index to these memoranda is maintained in the Division of Advice (A. 43).

supporting the issuance of a complaint, and, if leave is granted, may make an oral presentation to the Office of Appeals staff. If an oral presentation is allowed, other parties are notified and are given the opportunity to make their own oral presentation in separate meetings with the staff; however, no hearing with opposing parties present at the same time is held. Statements of Procedure, Section 101.6, 29 C.F.R. 101.6; Rules and Regulations, Section 102.19(b), 29 C.F.R. 102.19(b).

After the entire case file is reviewed by the Office of Appeals in the light of the parties' written and oral presentation, the General Counsel may affirm the Regional Director's refusal to issue a complaint, in which case a letter will be sent to the parties stating the grounds of the affirmance. Statements of Procedure, Section 101.6 29 C.F.R. 101.6; Rules and Regulations, Section 102.19(c), 29 C.F.R. 102.19(c); A. 199–204. No internal memorandum is prepared after such a decision; the Regional Director is simply sent a copy of the letter sent the parties (A. 94–95).[6]

If, however, the General Counsel concludes that further proceedings on the charges are warranted, the parties are so informed by letter, and a memorandum ("the appeals memorandum")[7] is sent to the Regional

[6] Prior to April 1971, a separate memorandum was prepared and sent to the Regional Director when his refusal to issue a complaint was sustained (A. 94–95).

[7] Within the Agency this memorandum is titled the "General Counsel's Minute" (A. 205–212). The district court incorrectly identified it as the "agenda minute," a term which has been used for memoranda prepared by Office of Appeals attorneys to serve as a basis for discussion of the appeal. The latter memoranda are not sought in the present case (Pet. App. C. p. 7a).

Director. This memorandum, like the comparable advice memorandum, sets forth the reasons why a complaint should issue, and often discusses matters related to its prosecution—*e.g.*, credibility of evidence, desirability of seeking further evidence, and legal arguments for reconciling the theory of the complaint with existing Board precedent (A. 205–212).[*] Upon receipt of this memorandum, the Regional Director, unless there is a settlement, issues a complaint. The memorandum is retained in the Regional Office file for guidance in prosecuting the case.

B. THE UNDERLYING UNFAIR LABOR PRACTICE CASE

On April 6, 1971, Sears, Roebuck and Co. ("Sears") filed a charge with the Board's regional office in Seattle, Washington, alleging that the Retail Clerks Union, Local No. 4, was violating Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. 158(b)(3), by refusing to bargain with Sears individually and insisting, instead, that Sears bargain in a multi-employer unit. After investigation, the Regional Director submitted the case to Washington for advice. Thereafter, by letters dated June 10 and July 26, the Regional Director notified Sears that he was refusing to issue a complaint on the charge because Sears' "attempted withdrawal from the [multi-employer association] was untimely, in that the investigation disclosed negotiations were already in progress at the time of the attempted withdrawal"; the Director cited

[*] These memoranda have no precedential significance and have never been indexed in any manner. They have been filed simply by case number and never by subject matter (A. 43, 20).

several Board cases as authority for his decision (A. 12–13, 21–23).

Sears appealed the Regional Director's decision to the General Counsel and, on August 20, the Acting General Counsel [9] reversed the Regional Director and ordered the issuance of a complaint. The Acting General Counsel ruled that the issue raised—whether a preliminary exchange of written proposals constituted a commencement of multi-employer negotiations—warranted Board determination (A. 32–33). An unfair labor practice complaint issued on September 1, 1971 (A. 34–37).[10]

C. THE FREEDOM OF INFORMATION ACT CASE

Before filing an appeal from the Regional Director's refusal to issue a complaint, Sears, relying on the Freedom of Information Act (hereafter FOI Act), requested that the General Counsel make available to it: (1) the memorandum prepared by the Division of Advice advising the Regional Director with respect to Sears' unfair labor practice charges; (2) all advice and appeals memoranda for the past five years which involve issues similar to those in the instant case; and

[9] The Acting General Counsel at that time was Eugene G. Goslee. On August 24, 1971, Peter G. Nash assumed the duties of General Counsel (A. 38, 40).

[10] On April 11, 1974, the complaint was withdrawn by the Regional Director following withdrawal of the underlying unfair labor practice charge by the charging party. See Rules and Regulations, Section 102.18, 29 C.F.R. 102.18. This does not affect the continuing vitality of Sears' demands under the Freedom of Information Act, which transcend this particular case (*infra*, pp. 13–52).

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(3) any index or digest of advice and appeals memoranda (A. 14–17). That request was denied by the Acting General Counsel on the ground that the "memoranda do not constitute a final disposition of a case but are rather guides for a Regional Director as to how a specific case is to be handled" (A. 19). The General Counsel also claimed that the materials were exempt from disclosure under Exemptions 5 and 7 of the FOI Act, *ibid.* See also A. 24–28, 29–31.

Sears then filed a complaint, which it subsequently amended, in the United States District Court for the District of Columbia under the FOI Act, seeking disclosure of the requested material (A. 4–11). The General Counsel [11] answered, requesting that the amended complaint be dismissed (A. 38–41), and the parties filed cross-motions for summary judgment (A. 142, 143).[12]

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[11] The suit was brought against both the National Labor Relations Board and its General Counsel. However, since the materials sought are all produced within the Office of the General Counsel, and the adjudicative side of the Board is not involved, petitioners will hereafter be referred to as "the General Counsel."

[12] On February 3, 1972, General Counsel Nash announced that, although the FOI Act did not require advice and appeals memoranda to be disclosed, he would voluntarily make such memoranda available in closed cases—*i.e.*, where appeal rights had been exhausted or a Board decision and order had issued—since such disclosure then would not interfere with the prosecution of cases. To protect future enforcement efforts, he added the provisio that "[w]e will delete from these memoranda all identification of witnesses, confidential sources of information and matters of a 'security sensitive nature.'" (A. 42–44.)

D. THE DECISIONS BELOW

The district court granted Sears' motion for summary judgment (Pet. App. C, pp. 4a–10a).[13] It held that advice memoranda are "instructions mandatory in substance if not in form," and thus constitute "instructions to Staff that affect a member of the public" under the FOI Act, 5 U.S.C. 552(a)(2)(C) (Pet. App. C, p. 7a); that appeals memoranda are "final opinions" under that Act, 5 U.S.C. 552(a)(2)(A) (Pet. App. C, p. 9a); that neither were "intra-agency" memoranda within the meaning of Exemption 5, 5 U.S.C. 552(b)(5) (Pet. App. C, pp. 8a–9a); and that documents incorporated by reference in advice and appeals memoranda, "though possibly qualified for a Sec. (b) exemption taken separately, * * * lost their exempt status by incorporation" (Pet. App. C, p. 8a).[14]

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[13] Earlier in the litigation, the district court granted Sears' request for a preliminary injunction staying the Board proceedings on the unfair labor practice complaint pending resolution of its FOI Act claims. The court of appeals reversed that order, *Sears, Roebuck and Co.* v. *National Labor Relations Board*, 473 F. 2d 91 (C.A.D.C.), certiorari denied, 415 U.S. 950. That matter is not at issue in the present case.

[14] Although the materials originally sought by Sears comprised only advice and appeals memoranda, together with indices, Sears' motion for summary judgment encompassed "underlying documentation" from Regional Office files as well (A. 51–52). In an affidavit filed with the district court, counsel for Sears complained that memoranda voluntarily made available to Sears by the General Counsel (see note 12, *supra*) could be adequately understood only in the light of documents in the case files and that the General Counsel had denied requests for such documentation (A. 137–139).

The district court ordered the General Counsel: (1) promptly to make available to the public "all Appeals and Advice memoranda issued since July 4, 1967, and any documents expressly incorporated therein by reference;" (2) to "produce and compile," with reasonable promptness, "indices of said memoranda"; (3) to "produce explanatory material including existing documents in those instances where Advice or Appeals memoranda rely upon the 'circumstances of the case' or some other vague and imprecise reference * * * except where [the General Counsel] can demonstrate that these documents are exempt under the Act"; and (4) to "cease and desist from deleting from said Appeals and Advice materials the names of parties, the names of attorneys, citations to prior cases and all other information for which a justification for deletion has not been explained fully in writing except settlement suggestions from the Office of the General Counsel and the names of affiants" (Pet. App. C, pp. 9a–10a).

The court of appeals affirmed on the basis of the district court opinion. It also cited its recent opinion in another FOI Act case, *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board*, 482 F. 2d 710, certiorari granted, May 28, 1974, No. 73–1316 (Pet. App. A, p. 2a).[15]

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[15] The Court has set *Grumman* for argument in tandem with the present case (A. 214).

SUMMARY OF ARGUMENT

Advice and appeals memoranda are not, as the courts below held, documents required by the FOI Act to be made publicly available and indexed. Rather, they are exempt under Section 552(b)(5), (b)(7), and (b)(2) of the FOI Act. Moreover, underlying documentation from the investigatory files is also exempt under Section 552(b)(7), and it does not lose this status by "incorporation" in memoranda found to be non-exempt.

I.

A. Exemption 5 of the FOI Act excepts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." That is, internal memoranda which would not be routinely disclosed through the discovery process to a private party in agency litigation need not be disclosed.

The legislative history of Exemption 5 indicates that Congress intended thereby to preserve the traditional privilege against disclosure of confidential intra-agency memoranda reflecting deliberations on legal and other policy matters, lest communications between those involved in the policymaking process be unduly constrained. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 86–87. Advice and appeals memoranda clearly fall within this class of documents. They reflect the views of the General Counsel

and his staff on unfair labor practice charges, and they are transmitted to Regional Directors as guidance in the issuance of dismissal letters or complaints, and in the prosecution or settlement of cases.

Advice and appeals memoranda are also privileged as attorney's work product (*Hickman* v. *Taylor,* 329 U.S. 495) since they are prepared by attorneys respecting possible agency litigation and reveal the "mental impressions" of the General Counsel and his staff on the issues and evidence in particular cases.

B. Exemption 7 of the FOI Act excepts from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." The legislative history indicates that the language of this exemption as originally proposed was broadened to ensure not only that investigations of violations of criminal and civil regulatory laws would be protected during pre-trial and trial stages, but that continuing protection would be afforded informants, agency investigative techniques, and the privacy of persons mentioned in the files.

Advice and appeals memoranda are related to the enforcement of the labor laws and are part of the regional office investigatory file, which contains all the material which may be used in litigating the case. Nor is it material that not all unfair labor practice charges are ultimately litigated, for Congress did not limit the exemption to files in cases actually prosecuted. See *Weisberg* v. *Department of Justice*, 489 F.

2d 1195 (C.A.D.C.) (*en banc*), certiorari denied, May 13, 1974 No. 73–1138.

C. Exemption 2 of the FOI Act exempts from disclosure matters "related solely to the internal personnel rules and practices of an agency." The House Report indicates that this includes "operating rules" and "guidelines" for "Government investigators or examiners." H. Rep. No. 1497, 89th Cong., 2d Sess., 10. Since advice and appeals memoranda, in giving guidance on particular cases, serve as internal guidelines for personnel in the regional offices, they are covered by this exemption.

II.

The courts below erred in holding that advice memoranda are "instructions to staff" within the meaning of Section 552(a)(2)(C) of the FOI Act, and that appeals memoranda are "final opinions" within the meaning of Section 552(a)(2)(A).

A. Section 552(a)(2)(C) requires an agency to index and "make available for public inspection and copying" all "administrative staff manuals and instructions to staff that affect a member of the public * * *." The legislative history indicates that the term "administrative" was inserted so as to distinguish documents in this category from those which are related to "law enforcement matters" or which concern the "prosecution or settlement of cases." Advice memoranda, which discuss the legal merits of unfair labor practice charges and other prosecutorial considerations, are documents of the type excluded from this section.

B. Section 552(a)(2)(A) requires an agency to index and make publicly available all "final opinions * * * made in the adjudication of cases." In investigating, dismissing, settling, or litigating unfair labor practice charges, the General Counsel and those exercising his delegated powers are acting as prosecutors rather than as adjudicators. Hence, complaints and dismissal letters can hardly be considered "final opinions" within the meaning of this section. *A fortiori,* appeals memoranda which reveal the deliberations leading to the issuance of complaints are not "final opinions * * * made in the adjudication of cases"; they merely trigger the institution of adjudicatory proceedings.

III.

In addition to compelling disclosure of advice and appeals memoranda, the courts below ordered disclosure of any documents expressly referred to in the memoranda, whether or not those documents would be otherwise exempt. The sole authority relied on for this holding, *American Mail Line, Ltd.* v. *Gulick,* 411 F. 2d 696 (C.A.D.C.), has no application to the facts of this case. Moreover, the application of the *Gulick* rule in the present case would tend, in future cases, to deter attorneys in the General Counsel's office from making specific reference to any sensitive documents which they would feel obligated to protect; they would thus be inhibited in giving a full account of facts relevant to important issues.

The portion of the district court order requiring the General Counsel to produce material explaining

references to "the circumstances of the case" and other "vague or imprecise reference[s]," except where he can justify why such material should be withheld, is similarly inappropriate. It might, in many cases, require the General Counsel to go beyond disclosure obligations under the FOI Act and create new explanatory documents not needed in the normal communication process between attorneys in the Washington office and those in the regional offices, who normally have the case file to refer to in connection with the memoranda.

In sum, the application of the *Gulick* incorporation rule in the present case tends to inhibit and unduly formalize intra-agency communication on policy matters, and to breach the confidentiality of investigatory files.

ARGUMENT

The Freedom of Information Act "establish[es] a general philosophy of full agency disclosure * * *." S. Rep. No. 813, 89th Cong., 1st Sess. ("Senate Report") 3. At the same time the Act recognizes that it is "necessary for the very operation of our Government to allow it to keep confidential certain material * * *" (*ibid.*). The Act makes available "to any person" all "identifiable" agency documents, unless they are specifically exempted from disclosure (5 U.S.C. 552). More specifically, the Act divides agency records into three categories: some must be published in the Federal Register (5 U.S.C. 552(a)(1)); others must be published or made publicly available and indexed (Section 552(a)(2)); all other "identifiable records"

must be made available on request (Section 552(a)(3)). The Act then defines nine categories of documents to which the Act "does not apply" (Section 552(b)).

The district court focused upon the issue whether advice and appeals memoranda are "instructions to staff" and "final opinions" which in terms are subject to disclosure under Section 552(a)(2). The critical inquiry, however, is whether these documents are exempt under Section 552(b), for, if they are, it is immaterial whether they are "instructions to staff" or "final opinions." The Act provides that its disclosure and other provisions do "not apply to matters that are" covered by the exemptions (Section 552(b)). We shall therefore argue first that the memoranda are exempt (Point I) and then show that they are not "instructions to staff" or "final opinions" within Section 552(a)(2) (Point II). Finally we shall argue that documents from investigatory files do not lose their exempt status by incorporation into advice and appeals memoranda (Point III).

I. ADVICE AND APPEALS MEMORANDA ARE EXEMPT UNDER SECTION 552(b) FROM THE DISCLOSURE REQUIREMENTS OF THE FOI ACT

A. ADVICE AND APPEALS MEMORANDA ARE INTRA-AGENCY MEMORANDA EXCEPTED FROM DISCLOSURE UNDER EXEMPTION 5

Exemption 5 of the FOI Act, 5 U.S.C. 552(b)(5), exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Exemption 5 protects any internal

memorandum which would not "*routinely* be disclosed to a private party through the discovery process in litigation with the agency." H. Rep. No. 1497, 89th Cong., 2d Sess. ("House Report") 10 (emphasis added). Thus, advisory memoranda, which are not routinely made available in discovery, are exempt under Exemption 5. As this Court observed in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 86, 87, "the legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions * * * are privileged from inspection'" (quoting *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 946 (Reed, J.)).

Exemption 5 thus is based on and incorporates the "public policy * * * of open, frank discussion between subordinate and chief concerning administrative action" (*Kaiser Aluminum & Chemical Corp.* v. *United States, supra*, 157 F. Supp. at 946). The importance of this policy was repeatedly noted during the legislative discussion of Exemption 5. Summarizing the views of government agency witnesses which were taken into account in formulating Exemption 5, the Senate Report states (at 9):

> It was pointed out * * * that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Govern-

> ment agencies were prematurely forced to "operate in a fish bowl."

See, also, House Report at 10.

Indeed, in another context, this Court recently recognized this policy.

> "Freedom of communication vital to fulfillment of wholesome relationships is obtained only by removing the specter of compelled disclosure * * * [G]overnment * * * needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 325 (D.C. 1966). [*United States* v. *Nixon,* No. 73–1766, decided July 24, 1974 (slip op., p. 23, n. 17).]

Memoranda reflecting deliberations on prosecutorial policies come within the traditional privilege against disclosure of "confidential intra-agency advisory opinions." *Zacher* v. *United States,* 227 F. 2d 219 (C.A. 8) (letter from United States Attorney to Attorney General recommending that certain criminal action be dropped). See also, *Clark* v. *Pearson,* 238 F. Supp. 495 (D. D.C.). (Justice Department file concerning certain bribery allegations). Cf. *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena, supra* (Justice Department memoranda relating to litigation over the Attorney General's interest in trademark rights seized by him under the Trading With the Enemy Act of 1917, 40 Stat. 411).

As shown above (*supra,* pp. 4–8), advice and appeals memoranda reflect the views of the General Counsel and his staff on whether and how an unfair labor

practice case should be prosecuted. They discuss strengths and weaknesses of the evidence, analyze various legal theories, and suggest litigation strategy. Thus, those memoranda come within the traditional privilege of "confidential intra-agency advisory opinions." Indeed, in the only case prior to the FOI Act considering a claim of privilege for advice memoranda, the court of appeals stated that such "intra-agency correspondence discussing the course of conduct to be followed by the parties and expressing opinions as to the merits of various claims presented to the agency enjoys at least a qualified privilege which, in the absence of special circumstances, shields it from examination by the public." *Davis* v. *Braswell Motor Freight Lines, Inc.*, 363 F. 2d 600, 604–605 (C.A. 5).[16] See also *Berkshire Employees Ass'n* v. *National Labor Relations Board*, 121 F. 2d 235, 237–238 (C.A. 3).

[16] In *Davis*, the Fifth Circuit was considering the validity of a subpoena *duces tecum* directed to Regional Director Davis, which was issued on behalf of Braswell Motor Freight Lines, Inc. (Braswell), the defendant in an action brought by Teamsters Union locals. One of Braswell's defenses referred to a case then pending before the Board, which it alleged would be "dispositive" of one of the issues in its litigation with the locals. The Regional Director, who had prosecuted the case, moved to quash the subpoena on the ground, *inter alia*, that the documents which the subpoena sought—*e.g.*, "memoranda or analysis pertaining to advice, instructions or directions from" the General Counsel—were "privileged." *Id.* at 602. The Fifth Circuit reversed the district court's denial of the motion to quash, holding that Braswell had made no adequate request for the documents before seeking to subpoena them. However, it discussed the privilege issue.

Advice and appeals memoranda are covered by Exemption 5 for a second, independent reason: they constitute the work product of government attorneys in preparation for litigation. See *Hickman* v. *Taylor*, 329 U.S. 495; see also 8 Wigmore, *Evidence* § 2378 (McNaughton Rev. 1961). The General Counsel is a litigating adversary with respect to unfair labor practice charges, and, in deciding whether and in what form to issue a complaint, he must make the same kind of analysis of available evidence that any attorney considering the institution of a law suit would make. "The work products of government attorneys are no less protected than those of private attorneys." *Thill Securities Corp.* v. *New York Stock Exchange*, 57 F.R.D. 133, 138 (E.D. Wis.); see also *United States* v. *Anderson*, 34 F.R.D. 518, 522 (D. Colo.).

As the Fifth Circuit has observed, the Board has a legitimate interest in keeping its "investigatory and prosecutorial functions uninhibited, and, as with the work product of any litigant, there should be some limit on the amount and type of preparatory material that can be subject to mandatory production." *J. H. Rutter Rex Manufacturing Co., Inc.* v. *National Labor Relations Board*, 473 F. 2d 223, 234, certiorari denied, 414 U.S. 822.[17] In advice and appeals memoranda,

[17] In *Rutter Rex*, the respondent in a backpay proceeding sought to subpoena regional office investigatory files, including notes on the case made by regional office investigators. The court rested its ruling that the notes were privileged, at least in part, on the ground that they were "an integral part of the preparation of the Board's lawsuit * * *." 473 F. 2d at 234.

the General Counsel, through his staff attorneys, sets out his "mental impressions" of the issues and evidence in a particular case, as a preliminary step to taking formal action—*i.e.*, issuing a dismissal letter foregoing enforcement action, or issuing a complaint launching the litigation which has been discussed and analyzed in the memoranda.[18] As "work products", these memoranda are "intra-agency memorandums * * * which would not be available by law to a party * * * in litigation with the agency"(5 U.S.C. 552(b)(5)).

The district court (whose opinion the court of appeals adopted) ruled that an appeals memorandum was not exempt under Exemption 5 because (Pet. App. C, p. 8a):

> This is not a preliminary view or a record of advocacy and debate, it is a final determination of the General Counsel's staff of the disposition of a charge. It is not an expression of a point of view, it is the disposition of a charge.

We point out hereafter (Point II) that these memoranda are not the "final opinion," but rather the very first step, "in the adjudication of cases." Moreover, nothing in the traditional privilege for confidential agency documents supports the court's distinction between "upward" memoranda recommending a course of action to a decisionmaker and "downward" memoranda in which a chief advises a subordinate on how to proceed.

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[18] The Board has held that such memoranda are irrelevant to its decision. *Truck Drivers Local No. 75 (Associated Transport, Inc.)*, 209 NLRB No. 46, p. 2, n. 1.

The "open, frank discussion between subordinate and chief * * *" (*Kaiser Aluminum Corp., supra,* 157 F. Supp. at 946) which Exception 5 is designed to protect is necessarily a two-way street. The court's restrictive reading limits the exemption in a manner which severely hampers agency operations by impeding the free flow of directions and advice from agency superiors to their subordinates in implementing agency objectives.

Advice and appeals memoranda do not lose the protection of Exemption 5 insofar as they contain factual material, as distinguished from purely advisory comments. While "purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government" (*Environmental Protection Agency* v. *Mink, supra,* 410 U.S. at 88), this Court has recognized that Exemption 5, in its present form,[19] is not to be interpreted

[19] The proposed original text of Exemption 5, excepted from disclosure "inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy * * *." The exemption was criticized as too narrow to protect internal memoranda which also contained facts, since intra-agency discussions of law or policy were rarely abstract, but generally included factual material. Decisions to prosecute, for example, could not be discussed without considering the particular case, including availability of proof and reliability of witnesses. See, *e.g.*, Hearing before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1160, *et al.* (Administrative Procedure Act), 89th Cong., 1st Sess. 36, 94–95, 112–113, 205, 236–237, 244, 366–367, 402–403, 417, 437, 490 (hereafter Senate Hearings); and Hearings before the Subcommittee of the House Committee on Government Operations on H.R. 5012, *et al.*, (Federal Public Records Law), 89th Cong., 1st Sess., Part 1, 223–224, 229–230, 256 (hereafter House

in a rigid manner, overlooking the character and function of the documents for which the exemption is claimed (*id.* at 91). Thus, it agreed with the view of the court of appeals in *Mink* that factual material is not properly held severable if it is " 'intertwined with policymaking processes,' " or if it could not be disclosed " ' without impinging on the policymaking decisional processes intended to be protected by this exemption.' " *Id.* at 92.

Applying this test here, we submit that advice and appeals memoranda in their entirety fall under the protection of Exemption 5. While a superficial examination of some of the memoranda in the present record might suggest that there are sometimes "severable" facts which could be disclosed (A. 185–198, 205–212), it is essential to consider the process by which such facts are selected and arranged. The attorneys writing the memoranda are not seeking to give a descriptive account of events they have personally observed. They are not reporting results of scientific research (Cf. *Mink, supra,* and *Soucie* v. *David,* 448 F. 2d 1067 (C.A.D.C.)). Rather, they select from the evidence in the investigatory file those facts considered relevant to the legal issues in the case, and they arrange them accordingly.[20]

Hearings). American Bar Association representative Robert M. Benjamin, testifying in support of broadening the exemption to include factual materials, suggested that language which indicated that discovery would not be altered would broaden the exemption to cover more material. Senate Hearings at 112–113. Exemption 5, as enacted, appears to reflect this advice.

[20] Cf. *Hickman* v. *Taylor, supra,* 329 U.S. at 508–509, concerning summaries of witness interviews.

In *Montrose Chemical Corp. of California* v. *Train*, 491 F. 2d 63, decided six months after the present case, the Court of Appeals for the District of Columbia recognized that factual material may be an integral part of the deliberative processes revealed in the memoranda. In *Montrose*, the plaintiff was seeking, under the FOI Act, summaries of evidence introduced at Environmental Protection Agency hearings on DDT. The summaries were prepared by staff assistants for the EPA Administrator, who was to review the record of the hearing and the decision of the hearing examiner and render a final decision on the question whether DDT registrations should be cancelled. Noting that in previous cases involving Exemption 5 a distinction had been drawn between factual information and deliberative material, the court observed that in the case before it "this factual versus deliberative distinction is inadequate to resolve the difficult question whether the factual summaries should be exempt from disclosure." 491 F. 2d at 67.

To the court, the "heart of the issue" was whether Montrose could "use the FOIA to discover what factual information the Administrator's aides cited, discarded, compared, evaluated, and analyzed to assist the Administrator in formulating his decision" (491 F. 2d at 68). The court concluded that the FOI Act did not authorize that result, stating (*ibid.*):

> The EPA assistants here were exercising their judgment as to what record evidence would be important to the Administrator in

> making his decision regarding the DDT registrations. Even if they cited portions of the evidence verbatim, the assistants were making an evaluation of the relative significance of the facts recited in the record; separating the pertinent from the impertinent is a judgmental process, sometimes of the highest order; no one can make a selection of evidence without exercising some kind of judgment, unless he is simply making a random selection.
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> * * * * *
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> To probe the summaries of record evidence would be the same as probing the decisionmaking process itself. To require disclosure of the summaries would result in publication of the evaluation and analysis of the multitudinous facts made by the Administrator's aides and in turn studied by him in making his decision. Whether he weighed the correct factors, whether his judgmental scales were finely adjusted and delicately operated, disappointed litigants may not probe his deliberative process.

Those considerations are similarly applicable to the present case, and show that the "factual" portions of the advice and appeals memoranda are not discoverable.

In *Montrose* the items sought were summaries of a hearing record which, in their very differences from the record itself, were therefore part of the decisionmaking process. Similarly, here the summaries of evidence, in their organization and selection of materials,

are also part of the decisionmaking process, even though the underlyng investigative material may not yet have been made public.[21]

When a complaint issues, the General Counsel, through the Regional Director, sets forth, with particularity, the incidents which, if proven, will in his judgment establish a violation of the National Labor Relations Act. And, in dismissal letters from Regional Directors (see, *e.g.*, A. 12–13, 21–23) and letters denying appeals from the Office of the General Counsel (see, *e.g.*, A. 199–204), the bases of the decisions are disclosed. To permit claimants to go behind these documents to factual statements in advice and appeals memoranda would give them little more of substance, except for certain confidential information[22] and a structural outline of the processes by which the ultimate decisions were reached.

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[21] Whether or not the underlying factual material has previously been made public will depend on whether an unfair labor practice complaint has been issued and whether a hearing has been held. Thus, there may be hearing records relating to some of the older advice and appeals memoranda sought by respondent. Of course, if the FOI Act demand is made by the charging party whose case is the subject of the advice or appeals memorandum before a complaint has been issued (or refused), there will be no record of hearing, but this is merely because these memoranda are compiled before the adjudicative process begins. In contrast, in *Montrose*, the summaries were written as the adjudicative process was ending.

[22] See discussion of Exemption 7, pp. 29–36, *infra*.

For these reasons, advice and appeals memoranda are, in their entirety, covered by Exemption 5, and hence need not be disclosed pursuant to the FOI Act.[23]

B. ADVICE AND APPEALS MEMORANDA AND THEIR UNDERLYING DOCUMENTATION ARE PARTS OF INVESTIGATORY FILES EXCEPTED FROM DISCLOSURE UNDER EXEMPTION 7

Exemption 7 of the FOI Act, 5 U.S.C. 552(b)(7), excepts from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." Advice and appeals memoranda and their underlying documentation are also protected by this exemption.

As originally proposed in Senate Bill S. 1666, the exemption for investigatory files exempted such files "until they are used in or affect an action or proceeding or a private party's effective participation therein." S. 1666, as amended, 88th Cong., 2d Sess., 110 Cong. Rec. 17087. This language appeared to exempt files from disclosure only in the early phases of investigation. As the Senate Committee noted, "[t]he exemption covers investigatory files in

[23] Accord: *Seattle Building & Construction Trades Council* v. *Henderson*, 82 LRRM 2362 (W.D. Wash.); *Elsing Manufacturing Co.* v. *National Labor Relations Board*, 82 LRRM 3054 (E.D. Okla.). In both cases, the plaintiffs sought memoranda relating to pending cases, but in *Seattle Building & Construction Trades Council*, the plaintiffs, in addition, unsuccessfully sought an injunction against deletions in memoranda voluntarily made available by the General Counsel.

general, but is limited in time of application." S. Rep. No. 1219, 88th Cong., 2d Sess. 14.

The provision as originally worded was opposed by Senator Humphrey, who called attention to the American Bar Association's opposition to any rule "which would permit a party to engage in a fishing expedition into the [National Labor Relations] Board's investigation files" since "opening of the Board's files to inspection would seriously handicap the Board in the investigation of charges." 110 Cong. Rec. 17667. Senator Humphrey also noted that the long established case law protecting the Board's investigatory files might be compromised by the new bill, observing that the provision was "susceptible to the interpretation that once a complaint of unfair labor practice is filed by the General Counsel of the National Labor Relations Board, access could be had to the statements of all witnesses, whether or not those statements are relied upon to support the complaint." *Ibid.* See also, Senate Hearings at 490–491. In consequence Senator Long, chairman of the subcommittee which had held the hearings on S. 1666, offered as a substitute the language eventualy enacted into the law. 111 Cong. Rec. 17668.

The House Report on the investigatory files exemption, as enacted, states:

> This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection

> with related Government litigation and adjudicative proceedings. S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings. [House Report at 11.]

The purposes of the exemption are reflected in the Senate Report, which notes that disclosure of such files "could harm the Government's case in court" (Senate Report at 9) and states that "[i]t is * * * necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation" (*Id.* 3). Summarizing these reports, the Court of Appeals for the Second Circuit, in *Frankel* v. *Securities and Exchange Commission*, 460 F. 2d 813, 817, certiorari denied, 409 U.S. 889, said:

> These Reports indicate that Congress had a two-fold purpose in enacting the exemption for investigatory files: to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court, and to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information. Both these forms of confidentiality are necessary for effective law enforcement.

The documentation underlying advice and appeals memoranda are "investigatory files related to enforcement of * * * labor * * * laws" (House Report at

11).[24] In light of the language and purposes of the exemption, we believe the advice and appeals memoranda themselves are part of the "investigatory files compiled for law enforcement purposes * * *" (5 U.S.C. 552(b)(7)). As indicated, these memoranda usually include a selective summary of investigative results and are placed in the regional office investigatory file which contains all the material to be used in litigating the case.

Moreover, since its decision in the present case, the Court below has recognized that, once a court has satisfied itself that documents sought are "investigatory files compiled for law enforcement purposes," its "duty in achieving the will of Congress under the Freedom of Information Act [is] at an end." *Weisberg* v. *Department of Justice*, 489 F. 2d 1195, 1202–1203 (C.A.D.C.) (*en banc*), certiorari denied, May 13, 1974, No. 73–1138. (Accord: *Center for National Policy Review* v. *Weinberger*, C.A.D.C. No. 73–1090, decided May 21, 1974, pending on petition for rehearing; *Rural Housing Alliance* v. *Department of Agriculture*, C.A.D.C., No. 73–1771, decided June 3, 1974; *Ditlow* v. *Brinegar*, 494 F. 2d 1073, 1074 (C.A.D.C.), petition for a writ of certiorari pending, No. 73–1780; *Aspin* v. *Department of Defense*, 491 F. 2d 24, 30 (C.A.D.C.).

[24] Indeed, the district court conceded that they were "possibly qualified for a Sec. (b) exemption taken separately," but held that they had "lost their exempt status by incorporation" (Pet. App. C, p. 8a). *Infra* in Point III, we discuss the district court's application of the doctrine of incorporation by reference.

Similarly, as explained in *Ditlow*, an agency need not prove, as to the contents of each requested file, that disclosure would "harm the Government's case in court"; for "it is not in the province of the courts to second-guess the Congress by relying upon considerations which argue that the Government will not actually be injured by revelation in the particular case." 494 F. 2d at 1074. Accordingly, it is immaterial in applying Exemption 7 whether a complaint issues on unfair labor practice charges or the charges are dismissed. See *Center for National Policy Review* v. *Weinberger, supra; Cowles Communications, Inc.* v. *Department of Justice,* 325 F. Supp. 726 (N.D. Cal.). Similarly, it is immaterial whether the case is closed or still pending.[25]

Advice and appeals memoranda do not come within the "except" clause of Exemption 7—which excepts material which would be "available by law to a party other than an agency." The legislative history of Exemption 7 shows that this exception was designed solely to insure that private litigating parties to whom material in an investigatory file is otherwise available by law do not lose that right by virtue of Exemption 7, *e.g.,* an individual who is entitled under the Jencks Act to see an FBI report. 110 Cong. Rec. 17667–17668. However, Exemption 7 "is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." House

[25] Amendments to Exemption 7 are under consideration in S. 2543, a proposed bill to amend the FOI Act (120 Cong. Rec. S9329–S9337 (daily ed., May 30, 1974)).

Report at 11. See *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591, 593–594 (D. P.R.). See also *Clement Brothers Co.* v. *National Labor Relations Board*, 282 F. Supp. 540, 542 (N.D. Ga.); *Benson* v. *United States*, 309 F. Supp. 1144 (D. Neb.).

The exception to Exemption 7 thus serves a purpose quite different from the exception to Exemption 5, which operates to make available to the general public those internal memoranda which would be routinely available to litigants. See, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (*Attorney General's Memorandum*), p. 38 (June 1967). But even if viewed as performing the same role, the exception to Exemption 5 would not avail the respondent.

As already noted (*supra*, p. 21), advice memoranda are not routinely available to parties to a Board proceeding (*Davis* v. *Braswell*, *supra*); nor is there any law suggesting that appeals memoranda would be. Indeed, discovery in unfair labor practice or related backpay proceedings is highly limited. *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F. 2d 854 (C.A. 2), certiorari denied, 402 U.S. 915.[26]

[26] Under the Board's "Jencks Act" rule a witness' pre-trial statements are made available after the witness has been called to testify in a Board proceeding. Rules and Regulations, Section 102.118(b), 29 C.F.R. 102.118(b). Discovery of such statements to a greater extent had generally been denied prior to the FOI Act. See, *e.g.*, *National Labor Relations Board* v. *Vapor Blast Manufacturing Co.*, 287 F. 2d 402, 405–408 (C.A. 7), certiorari denied, 368 U.S. 823; *National Labor Relations Board* v. *Chambers Manufacturing Corp.*, 278 F. 2d 715, 716 (C.A. 5); *Raser Tanning Co.* v. *National Labor Relations Board*, 276 F. 2d 80, 82–83 (C.A. 6), certiorari denied, 363 U.S. 830. Accordingly, the lower courts have denied requests

Cf. *National Labor Relations Board* v. *Rex Disposables*, 494 F. 2d 588(C.A. 5).[27] Moreover, the courts have recognized that "fishing expedition[s]" into Board files are not permissible, since, "[a]s with other prosecutorial and regulatory agencies, in order for the N.L.R.B. to fulfill its statutory duties, it must be accorded some semblance of evidentiary privilege to

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for such statements under the FOI Act as well. *Clement Brothers Co., Inc.* v. *National Labor Relations Board*, *supra*, approved in *National Labor Relations Board* v. *Clement Brothers Co., Inc.*, 407 F. 2d 1027, 1030–1031 (C.A. 5); *Barceloneta Shoe Corp.* v. *Compton*, *supra*. See also *Wellman Industries, Inc.* v. *National Labor Relations Board*, 490 F. 2d 427 (C.A. 4), petition for a writ of certiorari pending, No. 73–1785.

[27] In the special circumstances of a particular contempt proceeding, the Seventh Circuit held that the Special Master could compel production of certain case files for *in camera* inspection, to determine if they contained evidence relevant to the issues in the proceeding. However, the court recognized that the "integrity" of such files was to be respected as far as possible, and it expressly limited its holding "to contempt proceedings of the character now before us." *Olson Rug Co.* v. *National Labor Relations Board*, 291 F. 2d 655, 662 (C.A. 7).

protect its informal investigational and trial-preparatory processes." *J. H. Rutter Rex Manufacturing Co., Inc.* v. *National Labor Relations Board, supra,* 473 F. 2d at 231.

In its brief in the courts below, Sears emphasized the usefulness to parties of gaining access to advice and appeals memoranda, amplified by other "explanatory" documentation from the investigatory files. Doubtless many such documents would be of use to parties to Board proceedings. They would no doubt benefit also from gaining access to witnesses' affidavits or the trial attorney's notes. As this Court has observed, however, "Discovery for litigation purposes is not an expressly indicated purpose" of the FOI Act. *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.,* 415 U.S. 1, 24. By Exemption 7, Congress sought to insure that the FOI Act would not be used to expand discovery to reach an agency's investigatory files and thereby hobble an agency's enforcement of the law.

C. ADVICE AND APPEALS MEMORANDA ARE "INTERNAL PERSONNEL RULES AND PRACTICES" EXCEPTED FROM DISCLOSURE UNDER EXEMPTION 2

In addition to citing Exemptions 5 and 7, the General Counsel denied respondent's request for advice and appeals memoranda because they were "guides for a Regional Director as to how a specific case is to be handled" (A. 19). While the General Counsel did not cite Exemption 2, 5 U.S.C. 522(b)(2), our review of the case indicates that "guides * * * as to how a specific case is to be handled" are document-

"related solely to the internal personnel rules and practices of an agency," exempt from disclosure under Exemption 2.

In explaining Exemption 2, the Senate Report states (at 8):

> Exemption No. 2 relates only to internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.

The examples cited by the Senate Report are illustrative and not exclusive. Thus the House Report explains the exemption in the following terms (at 10):

> Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under present law.[14]

In footnote 14, the House Report referred to its hearings on the Act, where Congressman Moss—one of the leading architects of the FOI Act—stated with reference to Exemption 2:

> What this was intended to cover was instances such as the manuals of procedure that are handed to an examiner—a bank examiner, or a savings and loan examiner, or the guidelines given to an FBI agent. [House Hearings at 29.]

Subsequently, during the debates on the Act in the House, Congressman Gallagher explained further (112 Cong. Rec. 13659):

> I would like to reiterate that the bill also prevents the disclosure of other types of "sensitive" Government information such as FBI files, income tax auditors' manual, records of labor-management mediation negotiations and information a private citizen voluntarily supplies.
>
> The FBI would be protected under exemption No. 7 prohibiting disclosures of "investigatory files." Income tax auditors' manual would be protected under No. 2—"related solely to internal personnel rules and practices." * * *

Finally, when President Johnson signed the Act into law he noted that government officials "cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions." 2 *Weekly Compilation of Presidential Documents* 895 (July 11, 1966).

The leading administrative interpretation of Exemption 2 is contained in the *Attorney General's Memorandum* and it adopts the view reflected in this legislative history, that is, that the words "personnel rules and practices" in the exemption "are meant to relate to those matters which are for the guidance of agency personnel only, including internal rules and practices which cannot be disclosed to the public with-

out substantial prejudice to the effective performance of a significant agency function" (*id.* at 30). As an example of guidance which would be exempt, the *Attorney General's Memorandum* observed (p. 31):

> An agency cannot bargain effectively for the the acquisition of lands or services or the disposition of surplus facilities if its instructions to its negotiators and its offers to prospective sellers or buyers are not kept confidential.

This legislative history and administrative interpretation indicate that the General Counsel's "guides for a Regional Director as to how a specific case should be handled" are matters relating to "internal personnel rules and practices" within Exemption 2. While some lower courts have held that the examples set forth in the Senate Report reflect a congressional intent that only documents concerning an agency's relations with its employees are within Exemption 2,[28] we believe, for several reasons, that that view is unreasonable. In the first place, we can see no reason why Congress would have protected from disclosure such mundane matters as employee parking rules—whose confidentiality cannot be deemed necessary for effective functioning of government—while at the same time permitting disclosure of the kind of material

[28] *Stokes* v. *Brennan*, 476 F. 2d 699 (C.A. 5), *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787 (C.A. 6), and *Stern* v. *Richardson*, 367 F. Supp. 1316 (D. D.C.).

whose publication would jeopardize the precise governmental interests Congress intended to protect by the exemptions. Moreover, there is a vital and widespread government need in conducting adversary functions—law enforcement, contract administration, negotiations, etc.—to protect instructions and guidance to operating personnel where disclosure would undermine the function, and such communications generally fit logically under the concept and purposes of Exemption 2, as the House Report recognized.

In our view the better reasoned cases have recognized the important role of Exemption 2 in protecting the confidentiality of instructions to operating personnel. Thus in *Polymers, Inc.* v. *National Labor Relations Board,* 414 F. 2d 999, 1006 (C.A. 2), certiorari denied, 396 U.S. 1010, an agency manual, entitled "A Guide to the Conduct of Elections," was held exempt under Exemption 2.[29] See also *Cuneo* v. *Laird,* 338 F. Supp. 504 (D. D.C.), remanded on other grounds, 484 F. 2d 1086 (C.A.D.C.); *Pifer* v. *Laird,* 328 F. Supp. 649, 652 (N.D. Cal.).

There is, of course, a difference between a guide couched in generalized terms, discussing the handling of various classes of potential cases, and a guide "as to how a specific case is to be handled," but that is not a difference that puts advice and appeals memoranda without the scope and purpose of Exemption

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[29] But see *Rose* v. *Department of the Air Force,* 495 F. 2d 261 (C.A. 2). The Solicitor General has authorized the filing of a petition for a writ of certiorari in *Rose.*

2. The example in the *Attorney General's Memorandum* (*supra*, p. 39) of an agency bargaining "for the acquisition of lands or services or the disposition of surplus facilities" is instructive. To be sure an agency might formulate general guidelines for all its negotiations, however, it would be more likely to give guidance on a case-by-case basis. Surely the disclosure of the latter, as much as the former, would "substantial[ly] prejudice * * * the effective performance of a significant agency function" (*Attorney General's Memorandum*, p. 30).

So here, the General Counsel's advice and appeals memoranda instruct Regional Directors in the conduct of contemplated litigation. The confidentiality of such specific guidance is as important to the effective conduct of the agency's function as is the confidentiality of any general instruction in the handling of cases. Accordingly, advice and appeals memoranda are exempt under Exemption 2.

II. ADVICE AND APPEALS MEMORANDA ARE NOT "INSTRUCTIONS TO STAFF" OR "FINAL OPINIONS * * * MADE IN THE ADJUDICATION OF CASES" WITHIN SECTION 552 (a)(2) OF THE FOI ACT.

In holding that advice memoranda are "instructions to staff that affect a member of the public" within the meaning of Section 552(a)(2)(C) of the FOI Act and that appeals memoranda are "final opinions" within the meaning of Section 552(a)(2)(A) (Pet. App. C, pp. 7a, 9a), the courts below

misconstrued those provisions and misjudged the function of these memoranda.[30]

A. ADVICE MEMORANDA ARE NOT "ADMINISTRATIVE STAFF MANUALS AND INSTRUCTIONS"

Section 552(a)(2)(C) requires that agencies index and make available for public inspection "administrative staff manuals and instructions to staff that affect a member of the public." The court below ignored the modifying word "administrative" in holding that advice memoranda were "instructions to staff" within that provision.

As originally drafted, S. 1160, 89th Cong., 1st Sess., which was ultimately enacted as the FOI Act, would have required agencies to "make available for public inspection and copying" all "staff manuals and instructions to staff that affect any member of the public, unless such materials are promptly published and copies offered for sale." 111 Cong. Rec. 2797. This provision was amended by the insertion of the word "administrative" before "staff manuals and instructions," an amendment which the Senate Report explained as follows:

> The limitation of the staff manuals and instructions affecting the public which must

[30] Although the amended complaint alleged that the materials sought also came within Section 552(a)(2)(B), which encompasses "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register," the courts below correctly placed no reliance on this provision. As noted (*supra*, pp. 6, 8), advice and appeals memoranda have no precedential value and hence are not "adopted by the agency."

> be made available to the public to those which pertain to administrative matters rather than to law enforcement matters protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action. [Senate Report at 2.]

In a similar vein, the House Report noted that, under the amended language, "an agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the staff * * * in the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution or settlement of cases." House Report at 7–8.

In applying Section 552(a)(2)(C) to advice memoranda, the courts below ignored the fact that this Section applies only to "administrative" memoranda. As shown in the Statement (supra, pp. 4–6), advice memoranda "pertain to law enforcement matters" rather than to "administrative matters," and they necessarily concern the "prosecution or settlement" of cases. Nothing in the legislative history of Section 552(a)(2)(C) suggests that analyses by attorneys regarding the advisability of prosecuting a particular case are to be indexed and made available to the public.

Indeed, the court which has construed this provision most broadly would protect the confidentiality of information the disclosure of which would significantly impede the enforcement process, and would re-

quire disclosure only of other material which might "eventually affect the law enforcement process." *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787, 795 (C.A. 6). Advice memoranda, which analyze the evidence uncovered in the investigation of a particular case and which authorize the Regional Director to issue a complaint or to dismiss charges, would not be disclosable under this stringent test; they are not guidelines or rules which may "eventually" affect the law enforcement process, but are an integral part of that process.

Since, as shown, Congress excluded "law enforcement matters" from the ambit of Section 552(a)(2)(C), the courts below erred in concluding that advice memoranda fall within that provision, and its indexing requirement.[31]

B. APPEALS MEMORANDA ARE NOT "FINAL OPINIONS * * * MADE IN THE ADJUDICATION OF CASES"

Section 552(a)(2)(A) requires that agencies index and make available for public inspection and copying "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." The courts below ignored the modifying phrase "made in the adjudication of cases" in holding that appeals memoranda were "final opinions" within the meaning of that provision.

As explained in the Statement (*supra*, pp. 6–8), the appeals memoranda sought in this case are produced in connection with the General Counsel's exercise of his prosecutorial discretion under the Labor Management Relations Act. Since this discretion is as broad as that of attorneys general or United States At-

torneys (see p. 3, *supra*), the General Counsel is not required to give an explanation for a decision either to go forward or not to go forward with a given case. See *Weisberg* v. *Department of Justice, supra*, 489 F. 2d at 1201–1202; *Newman* v. *United States*, 382 F. 2d 479 (C.A.D.C.); *Division 1267, Amalgamated Association of Motor Coach Employees* v. *Ordman*, 320 F. 2d 729, 730 (C.A.D.C.).[32]

The appeals memorandum, which the General Counsel sends to a Regional Director when the General Counsel sustains an appeal from the Regional Director's refusal to issue a complaint, is not a final opinion "made in the adjudication" of a case, because the General Counsel is not an "adjudicat[or] of cases".[33] The memorandum merely triggers further

[31] The indexing requirement is applicable only to the materials enumerated in Section 552(a)(2) of the FOI Act (see, *infra*, p. 54). However, specifically identifies' advice or appeals memoranda would still have to be made available on request under Section 552(a)(3) (concerning "identifiable records") if they did not qualify for an exemption under Section 552(b). As shown (*supra*, pp. 18–41), advice and appeals memoranda to qualify for exemption.

[32] When he does go forward, the General Counsel is, of course, obligated to supply the party charged with a complaint particularizing the charges against him.

[33] The broad language of the Administrative Procedure Act's (APA) definitional section must be read in context. 5 U.S.C. 551(7) defines "adjudication" as "agency process for the formulation of an order." "Order" is defined as "the whole or part of a final disposition * * * of an agency in a matter" (5 U.S.C. 551(6)). An appeal memorandum is not the "final disposition" by the agency of the unfair labor practice complaint, since, in sustaining the appeal, the General Counsel has directed that a complaint be filed and the adjudicatory process begun.

proceedings in the case. It is part of the case file which the attorney in the regional office may refer to for guidance as he proceeds to the hearing before the Administrative Law Judge, who, on behalf of the Board and subject to its plenary review, will issue the "final opinion" made in the adjudication of the case.[24]

III. DOCUMENTS FROM INVESTIGATORY FILES DO NOT LOSE THEIR EXEMPT STATUS BY INCORPORATION INTO ADVICE AND APPEALS MEMORANDA

The courts below not only compelled disclosure of advice and appeals memoranda, but also opened the door to broad-scale incursions into other portions of the General Counsel's investigatory files.[25] Even if this

[24] When the General Counsel acts on an appeal from the Regional Director's refusal to issue a complaint, he sends the parties a letter briefly stating reasons for his action. These letters are not "final opinions * * * made in the adjudication of cases" because, as noted in the text, the General Counsel is not an adjudicator.

Because he is aware of the importance to the public of the way in which he carries out his responsibilities, the General Counsel also issues quarterly reports on significant cases and enforcement patterns. As General Counsel Nash has stated, "Such a policy, in my judgment, produces a better informed labor bar and public and affords me the opportunity to receive comments on my action * * *." (A. 150).

[25] The district court order requires the General Counsel to produce "any document expressly incorporated" in advice or appeals memoranda "by reference," and to "produce explanatory material including existing documents in those instances where [such] memoranda rely upon the 'circumstances of the case' or some other vague and imprecise reference without delineating what those circumstances are except where [he] can demonstrate that these documents are exempt under the Act" (Pet. App. C, pp. 9a–10a).

Court were to hold, contrary to our principal submission, that advice and appeals memoranda are not exempt under the FOI Act, we submit that that Act does not require the General Counsel to disclose other sensitive contents of his investigatory files simply because they happen to be referred to in such memoranda.

The courts below acknowledged that the documents referred to "possibly qualified for a Sec. (b) exemption taken separately" (Pet. App. C, p. 8a). Nevertheless the courts ruled that they must be disclosed where "incorporated by reference in Advice and Appeals memoranda" (*ibid.*). Nothing in the terms or legislative history of the FOI Act supports this result. Indeed, the courts below supported their holding solely by reference to a single case (Pet. App. C, p. 8a), *American Mail Line, Ltd.* v. *Gulick*, 411 F. 2d 696 (C.A.D.C.). That case, however, does not support the court's conclusion. *Gulick* concerned a decision by the Maritime Subsidy Board of the Department of Commerce that certain steamship operators were not entitled to the full amount of government subsidies which had previously been paid them. In reaching this decision, the Subsidy Board had to determine the maximum size of the crew necessary for efficient and economical operation of various kinds of vessels. The Subsidy Board publicly stated in its decision that its ruling on this question was based upon a "'memorandum dated November 26, 1965, revised December 20, 1967.'" 411 F. 2d at 698. It set forth as its own

finding and determination the last five pages of the memorandum, but declined to reveal the remainder.[36] The court of appeals held that the rest of the memorandum had to be disclosed under the FOI Act, explaining:

> If the Maritime Subsidy Board did not want to expose its staff's memorandum to public scrutiny, it should not have stated publicly in its April 11 ruling that its action was based upon that memorandum, giving no other reasons or basis for its action. When it chose this course of action "as a matter of convenience" (Brief for Appellee at 9) the memorandum lost its intra-agency status and became a public record, one which must be disclosed to appellants. [*Id.* at 703.]

The Court of Appeals for the District of Columbia has narrowly limited the rule of that case .In *Bristol-Myers Co.* v. *Federal Trade Commission,* 424 F. 2d 935, 939, the court cited *Gulick* for the proposition that "an internal *memorandum* may lose its protected status when it is *publicly cited* by an agency as the *sole basis* for agency action" (emphasis supplied). Accord: *Montrose Chemical Corp. of California* v. *Train, supra,* 491 F. 2d at 70; *Sterling Drug, Inc.* v. *Federal Trade Commission,* 450 F. 2d 698, 705–706 (C.A.D.C.).[37]

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[36] Its decision was implemented a week later by an order directing the steamship operators to refund over three million dollars in past subsidy payments. 411 F. 2d at 698.

[37] Similarly, the Court of Appeals for the Second Circuit, emphasizing the unique facts in *Gulick*, held that the case

The *Gulick* rule has no application to this case. Unlike the decision of the Maritime Subsidy Board, the advice and appeals memoranda, into which the district court found documents are incorporated, are not final adjudications of the agency. The memoranda are not intended as public records of decisions, nor is anything "publicly cited" in them. Moreover, what is cited is not given as the "sole basis" for agency action. Indeed, the documents "incorporated" in the memoranda are, for the most part, not themselves memoranda, but merely the statements of witnesses and other material obtained in the course of investigating the unfair labor practice charge.

The district court opinion makes a curious distinction. It provides that "documents incorporated by reference" in advice and appeals memoranda must be disclosed even though possibly exempt "taken separately" (Pet. App. C, p. 8a), but that documents underlying references in the memoranda to the " 'circumstances of the case' " need not be produced if "the General Counsel demonstrates such documents to be exempt" (Pet. App. C, p. 9a). The practical result of

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stood only for the proposition that a memorandum must be disclosed when it is "incorporated into the final order and administrative decision of [an] agency" and is "specifically referred to as the sole basis for its decision." *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1359, certiorari denied, 404 U.S. 827. Thus, it refused to order disclosure under the FOI Act of memoranda by Commission staff members which the plaintiff insisted were essential to understanding the basis for the Commission's disclaimers of jurisdiction in four prior cases.

applying this rule would be to inhibit the agency deliberative processes which Exemption 5 was designed to safeguard. For, to protect the confidential contents of investigatory files, attorneys writing advice and appeals memoranda would be induced to make vague reference to the "circumstances of the case," rather than specific references to sensitive documents, lest they strip them of their privilege by "incorporation."

There is no warrant for the district court's requirement that, where advice and appeals memoranda refer to "the circumstances of this case" or make other "vague or imprecise reference[s]," the General Counsel must either produce the underlying documentation or justify his failure to do so. Respondents' contention (C.A. Br. 18) that such general references "circumvent the public's right to know" the "rationale" of the memoranda is a bootstrap argument, for there was never any intention in the Act to allow public access to the memoranda themselves, let alone any matter referred to in them. Advice and appeals memoranda are not written for public consumption, to be issued as if they were full-fledged agency opinions. Rather, they are written for the benefit of those in the regional office who will use them, together with other contents of the investigatory files, for guidance in dismissing, settling, initiating, or prosecuting cases. The references to the "circumstances of the case" are

simply efficient, shorthand means of communicating with a Regional Director who already knows these circumstances fully, having previously reviewed the case.[38]

Indeed, the district court, through its requirement that the General Counsel "produce explanatory material," has gone beyond the requirements of the FOI Act, which obligate an agency only to *disclose* non-exempt, identifiable records. For, whenever such explanatory material exists only in confidential documents which the General Counsel is obligated to protect, he will be compelled to attempt to *create* a new document which will explain factual details without compromising confidential information.

In sum, the application of the *Gulick* incorporation rule in the present case tends to inhibit and unduly formalize intra-agency communication on policy matters, and to breach the confidentiality of investigatory files.

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[38] Streamlined procedures are essential in view of the heavy caseload handled by the Division of Advice and the Office of Appeals. In the year ending June 30, 1973, 1,287 cases were sent to Advice, representing 5 per cent of the cases disposed of by the regional offices. The corresponding figures for the preceding year were 1,444 cases, representing 5.8 per cent of total dispositions. The Office of Appeals handled 2,416 cases in the year ending June 30, 1973, and 2,470 during the previous year, representing 27.1 and 29 per cent, respectively, of total cases in which the Regional Directors refused to issue complaints. National Labor Relations Board Budget Document (Sept., 1973).

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the district court with directions to dismiss the complaint.

Respectfully submitted.

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APPENDIX

The provisions of the Freedom of Information Act 5 U.S.C. 552) are as follows:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedures, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person

may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

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